SUPREME COURT OF THE UNITED STATES

Nos. 326 and 327.—October Term, 1959.

Metlakatla Indian Community, Annette Island Reserve, Appellant,	
326 v.	
Egan, Governor of Alaska, et al.	On Appeals from the District Court for Alaska.
Organized Village of Kake, et al., Appellants,	
327 v.	
Egan, Governor of Alaska.	

[June 20, 1960.]

Mr. Justice Frankfurter delivered the opinion of the Court.

These consolidated cases were commenced on June 22 and 24, 1959, in the interim District Court for Alaska, by complaints seeking permanent injunctions against threatened enforcement by the new State of Alaska, its Governor, and other agents, of an Alaska statute (17 S. L. A. 1959, as amended, 95 S. L. A. 1959) making it a criminal offense to fish with traps. The statute was assailed on the ground that it was in conflict with applicable federal law. On July 2, 1959, orders were entered denying the injunctions, dismissing the complaints with prejudice, and denying an injunction pending appeal to this Court. 174 F. Supp. 500. On July 11, 1959, Mr. Justice Brennan, acting in his capacity as a circuit justice, granted appellants' application for an injunction pending final disposition of their future appeals to this Court. His opinion noted the existence of substantial questions, both as to our jurisdiction and the merits. 80 S. Ct. 33. The notices of appeal were filed on August 6, 1959; on Decem-

ber 7, 1959, we postponed further consideration of the question of jurisdiction to the hearing of the cases on the merits. 361 U. S. 911.

If the orders rendered on July 2, 1959 were those of the "highest court of a State in which a decision could be had," the appeals are within our jurisdiction under 28 U. S. C. § 1257 (2), since the court below sustained a statute of the State of Alaska against a claim of unconstitutionality under the United States Constitution. The jurisdictional problem arises out of the enactments governing Alaska's accession to statehood, specifically, in relation to the Constitution of the new State and to the state and federal laws governing the termination of the former territorial courts and their displacement by a new state judicial system and a Federal District Court for the District of Alaska. The State Constitution, which took effect "immediately upon the admission of Alaska into the Union as a state" (Art. XV, § 25) on January 3, 1959, provided for a Supreme Court, to "be the highest court of the State, with final appellate jurisdiction," a superior court, and such other courts as the legislature may provide. Art. IV, §§ 1, 2. Article XV, § 17, provides that in the transitional period until the new courts were organized, "the judicial system shall remain as constituted on the date of admission . . ." and that "[w]hen the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law."

The Alaska Statehood Act, 72 Stat. 339, which also became fully effective on January 3, 1959, in §§ 13–17, made similar provision for the eventual disposition of business pending in the territorial district court upon the

organization of the new District Court for the District of Alaska. However, it too provided, in § 18, that "the United States District Court for the Territory of Alaska shall continue to function as heretofore" for three years, or until the President proclaims that the new District Court "is prepared to assume the functions imposed upon it." In June, 1959, when these actions were commenced, and on July 2, when decision below was rendered, neither new federal nor state courts were in operation.

The first question presented is whether the interim Alaskan District Court was the "court of a State" in deciding this case. Sections 12 to 18 of the Statehood Act, 72 Stat. 339, make it plain that the interim court was not intended to be the newly created United States District Court for the District of Alaska, 28 U. S. C. § 81A; otherwise the nature of the court, whether state or federal, is not explicitly set forth. It is apparent, however, that the court is to a significant degree the creature of two sovereigns acting cooperatively to accomplish the joint purpose of avoiding an interregnum in judicial administration in the transitional period. The termination of the existence of the interim court is governed by federal law, Statehood Act § 18; but the termination of its general jurisdiction over state law matters, insofar as it is dependent on state consent, is governed by Alaska law, c. 50, S. L. A. 1959, § 31 (2), which also provides for the accelerated organization of separate Alaska courts should the interim court be terminated before they are ready. C. 50, S. L. A. 1959, § 32 (4), added by 151 S. L. A. 1959, § 1.

To determine our jurisdiction we need not engage in abstract speculation as to the function of the interim court in cases not before us. Whether the court can serve as a federal court, and the permissible scope of its powers if it may so serve, cf. *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582; *Benner* v. *Porter*, 9 How. 235, are perplexing questions, decision of which

should not be avoidably made. It is apparent that the legislature of Alaska vested the judicial power of the State in the interim District Court for the time being, that the district judge in this case explicitly deemed himself to be exercising such power, and that, in light of the express consent of the United States, he properly did so. *Benner* v. *Porter, supra.* It follows that the District Court sat as a "court of a State" to decide this case.

The question remains whether the interim court was also the "highest court" of Alaska within the meaning of 28 U. S. C. § 1257. At the time of the filing of the notice of this appeal on August 6, 1959, the latest time at which jurisdiction could properly be determined, no new Alaska state court was in actual operation, although on July 29 the Justices of the Court were designated by the Governor. The contention that the interim court was not the highest court of Alaska at that time rests upon this latter fact, and the terms of c. 151, S. L. A. 1959, § 1, amending c. 50, S. L. A. 1959, § 32, which provides that in the event that "a court of competent jurisdiction, by final judgment, declares that the United States Court of Appeals for the Ninth Circuit lacks jurisdiction to hear appeals from the District Court of the District of Alaska, the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices of the supreme court and appeals from the District Court of the District of Alaska may be made to the State Supreme Court."

Because the Ninth Circuit had ruled against its appellate jurisdiction over the interim court on June 16, 1959, six days before this action was commenced, *Parker* v. *McCarrey,* 268 F. 2d 907, it is urged that this provision, preserving appeals from the District Court to the Supreme Court of the State until the creation of that court, requires the conclusion that at least after July 29, when the Justices were appointed, appellate review was sufficiently

guaranteed to make the Supreme Court, and not the District Court, the highest court of Alaska in which a decision in the instant case could be rendered.

The question thus raised is not free from doubt. Viewing the case as of August 6, when the notice of appeal was filed, it is fairly arguable that the preservation effected by c. 151, S. L. A. 1959, § 32 (4) of the right to appeal to the Supreme Court of Alaska constituted the interim court as a lower court of Alaska within the intent of 28 U. S. C. § 1257 to await the completion of the State's adjudicatory process as a prerequisite to adjudication here. Yet, were the promise of an appeal, however indefinitely postponed, to be taken as sufficient to bar our jurisdiction under § 1257, its equally obvious purpose to allow substantial constitutional questions to be timely brought here as of right would be frustrated. Although this case was decided below on July 2, 1959, the date set by Alaska statute for full organization of the state courts was not until January 3, 1962, c. 50, S. L. A. 1959, §§ 31 and 32 (4). If no other fact were present, a potential delay of two and one-half years before the organization of a court to hear the preserved appeal would in itself counsel a construction against denial of our jurisdiction. Here, however, two additional facts must be weighed: (1) the Justices of the Supreme Court were actually appointed on July 29, in pursuance of a direction to accelerate the organization of the court; and (2) the effective promulgation of the rules of the court (accomplished on October 5, 1959) and appointment of a clerk were in their hands. C. 50, S. L. A. 1959, § 32 (3). While in light of these facts the question is exceedingly nice, we do not think that the assurance of a timely appeal to a court not yet functioning was sufficiently definite when the appeals were here filed to constitute a bar to our jurisdiction under § 1257 (2).

The interim court sustained the validity of the Alaska statute banning fishing with traps, 17 S. L. A. 1959, as amended by 95 S. L. A. 1959, against the claim of overriding federal law under the Supremacy Clause. The claim was based on an asserted conflict between the statute and regulations of the Secretary of the Interior, 24 Fed. Reg. 2053–71, prohibiting trap fishing in Alaskan waters generally, but excepting the appellants, thereby granting them in effect a license to fish with traps. The authority under which the Secretary purported to act is the Act of 1924, 43 Stat. 464, as amended, 48 U. S. C. §§ 221, 222.

A question not free from doubt, to put it at its lowest, thus raised under the Supremacy Clause, is however entangled with questions of construction of Alaskan state statutes as well as of the Alaska Statehood Act, *supra.* Also in issue is the effect of provisions of a compact between Alaska and the United States which, it is urged, reserved exclusive regulatory powers over Indian fishing rights to the United States, 72 Stat. 339, and which, so construed, is assertedly unconstitutional because of its failure to accord to Alaska participation in the Union on an "equal footing" with the other States. The latter contention raises related questions of federal power under the Commerce Clause, Art. 1, § 8. While we have before us questions of federal law that are the concern of this Court, their consideration implicates antecedent questions of local law turning in part on appreciation of local economic and social considerations pertinent to the scope of the so-called police power reserved to the State, upon which it would be patently desirable to have the enlightenment which the now fully formed Alaska Supreme Court presumably could furnish.

The original Act prohibiting traps was amended by 95 S. L. A. 1959, § 1, so as to provide that it shall not be construed inconsistently with the compact, and if the

Alaska court determines as a matter of statutory construction that the compact was designed to leave with the United States, as to Indian fishing, the power it exercises under the White Act, a constitutional question now appearing on the horizon might disappear. Moreover, since questions are raised regarding the status of these two Indian communities in relation to the authority of the Secretary of the Interior, enlightenment drawn on the spot by the Alaska Supreme Court may be material to any ultimate determination of federal questions by this Court. Finally, since the ultimate challenge to this legislation is that it must yield to superior federal authority, an authoritative pronouncement by the Supreme Court of Alaska with regard to the justifications of this legislation under the so-called police power would have important bearing on the question of the scope of the powers reserved to the State.

Accordingly, consistently with the policies embodied in § 1257, and in view of the peculiar facts of this case, we refrain at this stage from deciding the issues presented on the merits of this appeal so as to afford the Alaska Supreme Court the opportunity to rule on questions open to it for decision. We assume that that court has jurisdiction in these cases. However, since it alone can authoritatively decide such a question, we hold the cases on our docket. After the Alaska Supreme Court's decision, there may be further proceedings on this appeal; and if it assumes jurisdiction, a further appeal may be taken from its judgment. Cf. *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45.

Because of the nature of the asserted claim of federal right and the irreparable nature of the injury which may flow from the enforcement of these Alaska criminal statutes prior to a final determination of the merits, we

continue the stay granted by MR. JUSTICE BRENNAN on July 11, 1959, until the final disposition of the cases.

Having been advised that appeals in these cases are pending in the Alaska Supreme Court, we direct appellants to pursue those appeals for disposition not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent from remitting the parties to the Alaska Supreme Court, as they are of the view that the controlling questions are federal ones whose resolution is for this Court.

SUPREME COURT OF THE UNITED STATES

No. 2.—October Term, 1961.

Metlakatla Indian Community, Annette Island Reserve, Appellant, v. William A. Egan, Governor of the State of Alaska, and the State of Alaska.	On Appeal From the Supreme Court of the State of Alaska.

[March 5, 1962.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an appeal from a decision of the Supreme Court of the State of Alaska, — Alaska —, 362 P. 2d 901, affirming the denial of an injunction against interference by the State with appellant's use of fish-traps in the Annette Islands of southeastern Alaska. Appellant rests its claim in part on regulations promulgated by the Secretary of the Interior whereby the Metlakatla Indian Community was accorded the right to erect and to operate salmon traps at four locations in waters surrounding the Annette Islands, which Congress set aside for its use in 1891. Alaska challenged this authorization by a state conservation law forbidding the use of salmon traps.

Long before the white man came to Alaska, the annual migrations of salmon from the sea into Alaska's rivers to spawn served as a food supply for the natives. Commercial salmon fishing has become vital for Alaska's economy, but its exploitation seriously threatened the resource even before the turn of the century. See Gruening, The State of Alaska (1954), pp. 75, 97. Congress in 1889, in 1896, in 1906, and again in 1924 enacted conservation measures, prohibiting any obstruction of waters to impede salmon

migration, limiting the times and means of taking salmon, and authorizing the appropriate department to impose further restrictions.[1] When Alaska was established as a State, Congress withheld jurisdiction over her fisheries until she had made adequate provision for their administration.[2]

Equally with Congress, Alaska has been concerned with the evils of overexploitation. In particular she saw a menace in the fish-trap, a labor-saving but costly device, which became in her eyes the symbol of exploitation of her resources by "Stateside" colonialism. See Rogers, Alaska in Transition (1960), pp. 4–15; Gruening, *supra*, at pp. 392–407; Gruening, Let Us End American Colonialism (1955), reprinted at 103 Cong. Rec. 470, 474. The fish-trap, "a formidable structure," *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 87, consists principally of a fence or netting stretched across or partly across a stream to obstruct the upstream progress of the salmon and turn the fish into the "heart" or "pot" of the trap, where they are imprisoned until removed. See Rogers, *supra*, at p. 7; Gruening, The State of Alaska, *supra*, at pp. 169–170. At one time there were about 700 salmon traps in operation in Alaska. The Secretary of the Interior felt that the fish-trap's threat to conservation could be adequately dealt with by regulating the number of fish permitted to escape.[3] Alaska vigorously opposed this. The Territorial Legisla-

[1] 25 Stat. 1009; 29 Stat. 316 (Treasury Department); 34 Stat. 478, now 48 U. S. C. §§ 230–239, 241–242 (Commerce Department); 43 Stat. 464, now 48 U. S. C. §§ 221–228 (Commerce Department). The Secretary of the Interior succeeded to these responsibilities in 1939. 1939 Reorganization Plan No. II, § 4 (e), 53 Stat. 1431, 1433.

[2] 72 Stat. 339, 340–341. Alaska adopted a comprehensive fish and game code April 17, 1959, Alaska Laws 1959, c. 94, and received full control over her resources soon afterward.

[3] Letter of Douglas McKay, Secretary of the Interior, to Herbert C. Bonner, Chairman, House Comm. on Merchant Marine & Fisheries, Oct. 7, 1955.

ture several times sent memorials to Congress urging abolition of trap-fishing.[4] An ordinance to abolish all commercial traps was approved by Alaska voters along with the proposed State Constitution in 1956, and in early 1959 the first State Legislature turned this ordinance into the statute here under review.[5]

The Metlakatla Indians, some 800, led by a British missionary, moved from British Columbia to Alaska in 1887. In 1891 the Annette Islands, south of Ketchikan at the extreme lower end of the Alaskan archipelago, were "set apart as a reservation" by Congress for the Metlakatlans and other Indians, "to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior." 26 Stat. 1095, 1101, 48 U. S. C. § 358. In 1915 the Secretary issued regulations, 25 CFR (1939 ed.), pt. 1, establishing an elective council to make local ordinances for Metlakatla, and also permitting members of the Community to obtain permits for the use of salmon traps in waters adjacent to the Annette Islands. The next year, in fur-

[4] Alaska Laws 1931, p. 275; 1947, pp. 325–326; 1953, pp. 401–402; 1955, pp. 447–448.

[5] Alaska Laws 1959, c. 17. As amended by *id.*, c. 95, the statute reads as follows:

"Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; provided nothing in this section shall prevent the operation of small hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally operated in or above the mouth of any stream or river in Alaska; nor shall this Act be construed so as to violate Sec. 4 of Public Law 85–508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives."

therance of the Secretary's plan to establish a salmon cannery at Metlakatla, President Wilson by proclamation declared the waters within 3,000 feet of certain of these islands to be a part of the Metlakatla Reserve, to be used by the Indians as a source of supply for the intended cannery, "under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce." 39 Stat. 1777.[6] In 1918, without reference to the proclamation, this Court upheld the right of the Metlakatlans to exclude others from the waters surrounding their islands on the ground that these waters were included within the original reservation by Congress. *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78.

Ever since 1915, Metlakatla has operated fish traps with the consent of the Secretary of the Interior. Following the enactment of the State's fish-trap law in 1959, the Secretary in the exercise of his transitional power over Alaska fisheries banned all fish-traps except those operated by Metlakatla and by other Indians involved in the companion case, *Organized Village of Kake* v. *Egan*, *post*, p. ——. 24 Fed. Reg. 2053, 2056, 2069 (1959). The following year, having relinquished general control of the fisheries, the Secretary again authorized Metlakatla to operate fish-traps at four of eight specified locations, citing as authority the White Act, 43 Stat. 464, as amended, 48 U. S. C. §§ 221–228, and § 4 of the Alaska Statehood Act, 72 Stat. 339, 340, as amended by 73 Stat. 141. 25 CFR (1961 Supp.), pt. 88.[7]

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[6] In 1934, when the Metlakatlans were made citizens, Congress declared that reservations made for them by statute, order, or proclamation should "continue in full force and effect," 48 Stat. 667.

[7] Since 1944 Metlakatla has been a chartered federal corporation under a constitution adopted pursuant to the Wheeler-Howard Act, 48 Stat. 984, 988, as amended, 49 Stat. 1250, 25 U. S. C. §§ 473a, 476, 477.

With this background we reach the present controversy. In May, 1959, just before the salmon season began, the State warned Metlakatla and other Indians that she would enforce the fish-trap law against them. The threat was intensified when the State arrested members of other Indian communities and seized one fish-trap. Suits were thereupon filed by Metlakatla and by the appellants in the companion case in the interim United States District Court for the District of Alaska, seeking an injunction against interference with their asserted federal rights to fish with traps. All complaints were dismissed, 18 Alaska —, 174 F. Supp. 500. Appeal was brought to this Court, as the Supreme Court of Alaska had not yet been fully organized. Pending decision, MR. JUSTICE BRENNAN granted a stay of enforcement by the State, 4 L. Ed. 2d 34, 80 S. Ct. 33. The Court assumed jurisdiction and continued the stay but remanded the case to the newly constituted State Supreme Court primarily for its disposition of matters of local law, 363 U. S. 555. That Court affirmed the District Court's dismissal, holding the fish-trap law applicable to Metlakatla and to the other appellants, and upholding its validity as so applied, — Alaska —, 362 P. 2d 901. From its judgment, the appeal is properly here under 28 U. S. C. § 1257. We noted probable jurisdiction, 368 U. S. 886.

Several grounds of the decision below are now out of the case on concession of error by Alaska, but she firmly stands on the judgment in her favor. Metlakatla argues that it is immune from the fish-trap law because (1) state law cannot regulate Indian activities on Indian reservations; (2) the State cannot regulate a federal instrumentality; and (3) appellant has been authorized to operate traps by the Secretary of the Interior. The United States has supported Metlakatla as *amicus curiae*, see 362 U. S. 967.

The Indians of southeastern Alaska, who have very substantially adopted and been adopted by the white man's civilization, were never in the hostile and isolated position of many tribes in other States. As early as 1886 a federal judge, holding Alaskan Indians subject to the Thirteenth Amendment, denied that the principle of Indian national sovereignty enunciated in *Worcester* v. *Georgia*, 6 Pet. 515, applied to them. *In re Sah Quah*, 31 F. 327 (D. Alaska). There were no Indian wars in Alaska, although on at least one occasion, see Gruening, The State of Alaska (1954), pp. 36–37, there were fears of an uprising. There was never an attempt in Alaska to isolate Indians on reservations. Very few were ever created, and the purpose of these, in contrast to many in other States, was not to confine the Indians for the protection of the white settlers but to safeguard the Indians against exploitation. Alaskan Indians are now voting citizens, some of whom occupy prominent public office in the state government. See *United States* v. *Booth*, 161 F. Supp. 269 (D. Alaska 1958); *United States* v. *Libby, McNeil & Libby*, 107 F. Supp. 697, 699 (D. Alaska 1952). Metlakatlans, the State tells us, have always paid state taxes, in contrast to the practice described and prescribed for other reservations in *The Kansas Indians*, 5 Wall. 737, and it has always been assumed that the reservation is subject to state laws. *United States* v. *Booth, supra*, 161 F. Supp., at 270. Congress in 1936, 49 Stat. 1250, 48 U. S. C. § 358a, by authorizing the Secretary of the Interior to create Indian reservations of land reserved for Indian uses under 48 U. S. C. § 358, seems to have believed that Metlakatla was no ordinary reservation, since Metlakatla alone is covered in § 358. Finally, in *United States* v. *Booth, supra*, the District Court for Alaska held that a crime committed on the Metlakatla Reserve, before the extension of jurisdiction over Indian

country to Alaska, see p. 11, *infra*, was punishable under territorial laws, since for the reasons here outlined the Reserve was not "Indian country" within the meaning of 18 U. S. C. §§ 1151–1153.

The words "set apart as a reservation," appearing in the statute creating the Annette Island Reserve, are substantially the same as used in numerous other statutory reservations. *E. g.*, 13 Stat. 63 (Uinta Valley, Utah); 13 Stat. 541, 559 (Colorado River); 18 Stat. 28 (Gros Ventre and others); 19 Stat. 28, 29 (Pawnee). None of these statutes made express provision for self-government or for state government. Some treaties, such as that with the Cherokees in 1828, 7 Stat. 311, expressly excluded state laws. Other treaties, however, while sometimes phrased in terms of a gift or assignment rather than a reservation of land, made no mention of state power. *E. g.*, Treaty with the Shawnee Tribe, 1825, 7 Stat. 284; Treaty with the Potawatomies, 1837, 7 Stat. 532; Treaty with the New York Indians, 1838, 7 Stat. 550, 551; Treaty with the Sacs and Foxes, 1842, 7 Stat. 596. Later treaties "set apart for the absolute and undisturbed use and occupation" of the Indians certain lands. *E. g.*, Treaty with the Arapahoes and Cheyennes, 1867, 15 Stat. 593, 594; Treaty with the Crow Indians, 1868, 15 Stat. 649, 650. The 1868 Treaty with the Navajos was similar. 15 Stat. 667, 668. And the 1855 treaty with the Quinault Indian Tribe, 12 Stat. 971, which the Supreme Court of Washington held barred state regulation of reservation fishing, promised only that lands would be "reserved, for the use and occupation of the tribes." It was implemented by an executive order of November 7, 1873, by which certain lands were "withdrawn from sale and set apart for the use" of the tribe. See *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 657–658, 294 P. 557.

The provision creating the Metlakatla reserve in 1891 was added to a House bill dealing with timber lands on the floor of the Senate by Nebraska's Senator Manderson. Reciting the unfortunate experience of the Metlakatlans in British Columbia and their emigration to Alaska, Senator Manderson explained that his amendment was designed to dispel fears of expulsion from their new lands as from their old, or of intrusion by outsiders seeking to exploit the resources of the islands. The purpose, he stated, was "simply to allow this band of Indians to remain there under such rules and regulations as the Secretary of the Interior may impose, and give them some recognized footing at that place." Remarks by Senators Dawes and Dolph were to the same effect. 21 Cong. Rec. 10092–10093 (1890). The amendment was agreed to and adopted by both Houses after a conference, with no further discussion.

This provision subjecting Metlakatla to rules and regulations of the Secretary of the Interior is unusual. Since 1849 the Secretary had been the officer of the United States charged with administration of the Indian laws, but none of the treaties or statutes which have come to our attention contained such a provision. The Cheyenne and Crow treaties, *supra,* provided that Congress might regulate matters on the reservations, but this was no delegation of Congress' powers to the Secretary. It was but a recognition by the Indians of powers the Constitution gave to the national legislature.

The regulations issued by the Secretary for the government of the Annette Islands January 28, 1915, appear to be without parallel. No such rules applying to other reservations are to be found in the Code of Federal Regulations. The Secretary vested powers of local government in an elective council, 25 CFR (1939 ed.), § 1.2, which was given authority to pass ordinances required not

to conflict with "the laws of the United States, the laws of the Territory of Alaska, or the rules and regulations in this part," § 1.10, and subject to review by the Secretary, § 1.62. As a condition to the right to vote in local elections members of the Reserve—limited to Metlakatlans and other natives, § 1.51—were required to swear obedience to local laws, laws of the United States, and laws of the Territory of Alaska, § 1.52. Thus the Secretary, in the exercise of the authority delegated him by Congress, subjected self-government of Metlakatla not only to federal oversight but to territorial laws as well. However, as discussed above, an additional regulation issued by the Secretary in 1915 authorized the use of fish-traps at Metlakatla, and this permission has been continued in regulations issued since statehood.

Alaska urges that the regulations are invalid because neither the White Act nor the Statehood Act conferred authority on the Secretary to permit Metlakatlans to use fish-traps. The State's premise is correct, *Organized Village of Kake* v. *Egan*, *post*, p. ——. However, Congress in 1891 gave the Secretary authority to make rules governing the Metlakatla reservation, and his authority, like the reservation itself, *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, extended to the waters surrounding the islands. Does this Act validate the regulations in light of subsequent legislative and executive actions?

The Presidential Proclamation of 1916, 39 Stat. 1777, declared waters within 3000 feet of Annette and adjacent islands to be a part of the Metlakatla Reservation and provided that the Indians should have the use of these waters "under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce." Alaska argues that the purpose of this provision was to place Metlakatla fishermen in the same position as all others in Alaska by subjecting them to the same

laws. In 1916 the general laws were federal; now they are those of the State. Therefore, the State contends, the policy of the Proclamation requires that the provision be construed as subjecting the Metlakatlans to the laws governing all other fishermen, which now include the state fish-trap law. The Metlakatlans have the right to exclude others from their waters, Alaska agrees, but not the right to be free from regulation.

Alaska does not argue that the Proclamation deprived the Secretary of the Interior of the authority Congress gave him to prescribe rules governing fishing and other activities on the Annette Islands. Assuming the President had power to do so, he did not purport to exercise it. Quite the contrary. The Proclamation recites that the Secretary has determined to establish a cannery for the Metlakatlans, that the Secretary has been given authority to make regulations for Metlakatla by the statute of 1891, and that protection of the Indians' fishing rights is required to assure a supply of fish for the cannery. Apparently the Proclamation was prompted by the threatened encroachment of non-Indian fishermen into Metlakatla waters and the fear that the reservation of the islands might not protect the Indians against such intrusions. No statutory authority for the Proclamation was cited. It was declared to be issued under authority of "the laws of the United States." It is clear that President Wilson was attempting to assist and promote the plans of the Secretary of the Interior to develop the reserve under his statutory authority, not to limit or destroy that authority. The subjection of Metlakatla to general fisheries laws and to regulations of the Secretary of Commerce thus did not make those laws and regulations superior to regulations of the Secretary of the Interior. Rather the general laws and Commerce regulations were adopted as a part of the Interior regulations, so far as not in conflict with other

rules adopted by the Secretary of the Interior, and subject to his further modification under the power given him in 1891.

Nor did the White Act impair the Secretary's power. That statute permitted the Secretary for conservation purposes to limit the taking of salmon in areas of his designation, but prohibited his granting exclusive rights in so doing. This Court in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, held that the prohibition bars the Secretary from creating exclusive White Act rights in Indians as well as in non-Indians, but it expressly disclaimed holding that no exclusive Indian rights may exist. 337 U. S., at 118–119, 122–123. The Secretary's regulations did not create exclusivity; that was a part of the reservation as created in 1891 and clarified by the proclamation of 1916, which excluded others from fishing in Metlakatla waters.

In 1958, 72 Stat. 545, Alaska was added to the list of States and Territories permitted to exercise civil and criminal jurisdiction over Indian reservations. The State has not argued that this took away the power of the Secretary of the Interior to make regulations contrary to state law. Appellant has argued, to the contrary, that the statute expressly preserved Indian fishing rights from state laws. The statute granting States civil and criminal jurisdiction was passed in 1953, 67 Stat. 588, 18 U. S. C. § 1162, 28 U. S. C. § 1360. Subsection (b) of that statute provides that nothing therein shall authorize alienation, encumbrance, or taxation of Indian property, "or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect

to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

This statute expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation, but only those fishing rights and privileges given by federal treaty, agreement, or statute. It might plausibly be argued, therefore, that fishing rights given by regulation are not protected and state jurisdiction is established. Legislative history is silent as to the interpretation of the provision. See H. R. Rep. No. 848, 83d Cong., 1st Sess.; S. Rep. No. 699, 83d Cong., 1st Sess.; 99 Cong. Rec. 9962, 10782, 10928 (1953). The apparent purpose of the proviso was to preserve federally granted fishing rights. It would be sheer speculation to attribute significance to the imperfect parallelism of the provisions protecting property and fishing rights in the absence of any suggested reason for excluding fishing rights based on regulations. The process of statutory drafting and evolution, here veiled from scrutiny, is too imprecise to permit such an inference. Cf. *United States* v. *Mersky*, 361 U. S. 431, 437. In any event, the proviso also protects rights given the Indians by statute respecting the control and regulation of fishing, and the 1891 statute gave the Metlakatlans the right to fish under regulations of the Secretary of the Interior.

Section 6 (e) of the Alaska Statehood Act, 72 Stat. 339, 340–341, providing for the conveyance of United States properties "used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska," contemplated transfer to the State of the same measure of administration and jurisdiction over fisheries and wildlife as possessed by other States, S. Rep. No. 1929, 81st Cong., 2d Sess. (1950) 13–14; H. R. Rep. No. 1731, 80th Cong., 2d Sess. (1948) 1; S. Rep. No. 1028, 83d Cong., 2d Sess. (1954) 31; S. Rep. No. 1163, 85th Cong., 1st

Sess. (1957) 3, see *Geer* v. *Connecticut*, 161 U. S. 519, after the transition period during which the State was to establish machinery for this purpose. Section 4, however, as amended by 73 Stat. 141, required Alaska to disclaim all right and title to any United States property not granted her by the statute, and also "to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives." Such property was to "be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe," with immaterial exceptions, and provided that claims against the United States are neither enlarged, diminished, nor recognized by these provisions. This disclaimer is substantially the same as found in the acts admitting 13 other States. See S. Rep. No. 315, 82d Cong., 1st Sess. (1951) 15.

Alaska does not expressly argue that the Secretary's power was destroyed by the Statehood Act. She does, however, contend that control of all fishing was transferred to the State with no exception for Indian fishing, and that only the exclusiveness of Metlakatla's fishing rights was preserved. But legislative history makes clear that the transfer of jurisdiction over fishing was subject to rights reserved in § 4. S. Rep. No. 1929, 81st Cong., 2d Sess. (1950) 2.

Clearly this section does not protect only "recognized" Indian rights—those the taking of which would be compensable by the United States. Committee reports demonstrate the aim of Congress to preserve the status quo as to a broader class of "right," including, in the case of land, mere possession or occupancy. Compensation was an issue Congress took pains to avoid. See H. R. Rep.

No. 1731, 80th Cong., 2d Sess. (1948) 15; H. R. Rep. No. 255, 81st Cong., 1st. Sess. (1949) 13; S. Rep. No. 1028, 83d Cong., 2d Sess. (1954) 4, 29–30; S. Rep. No. 1163, 85th Cong., 1st Sess. (1957) 15. We need not here explore the remoter reaches of this protection. The Metlakatla reservation was Indian property within § 4. Whether or not the "absolute jurisdiction" retained by the United States in § 4 is exclusive of state authority, see *Organized Village of Kake* v. *Egan*, *post*, p. ——, the statute clearly preserves federal authority over the reservation. Federal authority was lodged in the Secretary in 1891, and it was not dislodged by the Statehood Act.

However, in issuing the present regulations the Secretary relied not on the 1891 statute but on the White Act and the Statehood Act, neither of which authorized his action. In a letter to the Solicitor General, filed by the United States as an Appendix to its brief as *amicus curiae*, the Secretary left no doubt that in issuing the regulations he acted under compulsion of what he conceived to be his duty under the Statehood Act to preserve the *status quo*. He deemed himself, as it were, to be a mere automaton. The exercise of any authority that the Secretary has under the reservation statute to allow fish-traps necessarily involves his judgment on a complex of facts, his evaluation of the relative weights of the Indians' need for traps and of the impact of traps at Metlakatla on the State's interest in conservation. We cannot make this determination for him.

The appropriate course is to vacate the judgment of the Supreme Court of Alaska and remand the case there to be held to give ample opportunity for the Secretary of the Interior with all reasonable expedition to determine, prior to the 1963 salmon fishing season, what, if any, authority he chooses to exercise in light of this opinion. Should the Secretary fail so to act, the parties may apply to the Alaska court for further proceedings not inconsistent with

this opinion. See *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 618–619. The stay granted by MR. JUSTICE BRENNAN, and continued by the Court, will remain in force until the end of the 1962 salmon fishing season, as defined in the regulations issued by the Secretary of the Interior.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1961.

Organized Village of Kake, and Angoon Community Association, Appellants, *v.* William A. Egan, Governor of Alaska.	On Appeal From the Supreme Court of the State of Alaska.

[March 5, 1962.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is a companion case to No. 2, *Metlakatla Indian Community* v. *Egan, ante,* p. —, but calls for separate treatment. Appellants seek the reversal of a decision of the Supreme Court of Alaska, — Alaska —, 362 P. 2d 901, affirming the dismissal of their petitions for injunctions against interference with their operation of fish-traps in southeastern Alaska.

The Organized Village of Kake and the Angoon Community Association are corporations chartered under the Wheeler-Howard Act of 1934, 48 Stat, 984, 988, as amended, 49 Stat. 1250 (1936), 25 U. S. C. §§ 473a, 476, 477. Kake is located on Kupreanof Island, 100 miles south of Juneau. Angoon is located on Admiralty Island, 60 miles south of Juneau. They are occupied by Thlinget or Tlinget Indians, native to Alaska.

Both communities are entirely dependent upon salmon fishing. In pursuance of a policy to create a sound fishing economy for the two groups, the United States purchased canneries and related properties for Angoon in 1948 and for Kake in 1950. Since these dates appellants have operated fish-traps at specified locations in nearby waters, under permits granted by the Army Engineers to

erect traps in navigible waters and by the United States Forest Service to anchor them in the Tongass National Forest. In March 1959 the Secretary of the Interior, by regulations issued under authority of the White Act, 43 Stat. 464, as amended, 48 U. S. C. §§ 221–228, and the Alaska Statehood Act, 72 Stat. 339, permitted Angoon to operate three fish-traps during the 1959 season and Kake four. 24 Fed. Reg. 2053, 2069. The following year the Secretary authorized permanent operation of these trap-sites and specified one additional site for Angoon and five more for Kake for possible future authorization. 25 CFR (1961 Supp.) pt. 88.

The history of this litigation is recited in *Metlakatla Indian Community* v. *Egan*, *supra*. It is sufficient to note here that Alaska in 1959 threatened to enforce against Kake and Angoon her anti-fish-trap conservation law, Alaska Laws 1959, c. 17, as amended by *id.*, c. 95; that the State seized one fish-trap at Kake, arrested the President of the Kake Village Council and the foreman of the crew attempting to moor the trap, and filed informations against them; that suit was filed by both Kake and Angoon in the interim United States District Court for Alaska to enjoin this interference with their claimed fishing rights; and that the dismissal of both complaints was affirmed by the Supreme Court of Alaska.

The situation here differs from that of the Metlakatlans in that neither Kake nor Angoon has been provided with a reservation and in that there is no statutory authority under which the Secretary of the Interior might permit either to operate fish-traps contrary to state law. Appellants do not rely heavily on the Secretary's regulations. Neither the White Act nor the Statehood Act, cited by the Secretary, supports a grant of immunity from state law. The White Act was a conservation and anti-monopoly measure. It authorized the Secretary to limit fishing times, places, and equipment in

order to conserve fish but forbade him in so doing to create exclusive rights, even in Indians. *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 122–123. Because the rights claimed are exclusive in the Kakes and Angoons, they cannot have been created pursuant to the White Act, even though that statute now applies, if at all, only to Indians. Moreover, the White Act gives the Secretary power only to limit fishing, not to grant rights. The Statehood Act retained "absolute jurisdiction and control" of Indian "property (including fishing rights)," in the United States, but it did not give powers of the nature claimed to the Secretary of the Interior. No other source of authority appears available. The provisions now found in 25 U. S. C. §§ 2 and 9, referring to the President's power to prescribe regulations for effectuating statutes "relating to Indian affairs," to settle accounts of "Indian affairs," and concerning "the management of all Indian affairs and of all matters arising out of Indian relations," derive from statutes of 1832 and 1834, 4 Stat. 564 and 4 Stat. 735, 738. In keeping with the policy of almost total tribal self-government prevailing when these statutes were passed, see pp. 11–12, *infra*, the Interior Department itself is of the opinion that the sole authority conferred by the first of these is that to implement specific laws, and by the second that over relations between the United States and the Indians—not a general power to make rules governing Indian conduct. United States Department of the Interior, Federal Indian Law (1958), pp. 54–55; Cohen, Handbook of Federal Indian Law (1941), p. 102. We agree that they do not support the fish-trap regulations.

Both communities operate their traps under permits granted by the Army Corps of Engineers and by the United States Forest Service. But neither of these permits grants a right to be free of state regulation or prohibition. Like a certification by the Interstate Commerce Commission, each is simply acknowledment that

the activity does not violate federal law, and not an exemption from state licensing or police power requirements. Cf. *Maurer* v. *Hamilton*, 309 U. S. 598; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177. The Engineers have no objection under the Rivers and Harbors Act, 30 Stat. 1121, 1151, 33 U. S. C. § 403, to the obstruction of navigable streams incident to the operation of fish-traps at Kake and Angoon; the Forest Service has no objection to the use of National Forest land to anchor them. Neither attempted to exempt these traps from state law.

As in the companion case, certain grounds relied on by the Alaska court are no longer urged by the State. The principal dispute now concerns the meaning of § 4 of the Statehood Act, in which the State disclaimed all right and title to and the United States retained "absolute jurisdiction and control" over, *inter alia*, "any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives."

The United States in its brief *amicus curiae* contended that the reservation of absolute jurisdiction over Indian "property (including fishing rights)" ousted the State from any regulation of fishing by Indians in Alaska. Appellants urge that Congress intended to protect the Indians in their freedom to continue fishing as they had done before statehood, so that Alaska cannot interfere with the Indian fishing actually practiced at that time. They argue in addition that in using fish-traps they were exercising an aboriginal right to fish that was protected by § 4. The court below concluded that aboriginal rights of Alaskan natives have been extinguished, that appellants have no rights not enjoyed in common with all other Alaskans, and that § 4 protects only exclusive rights given Indians by federal law.

The United States wisely abandoned its position that Alaska has disclaimed the power to legislate with respect to any fishing activities of Indians in the State. Legislative history reveals no such intention in Congress, which was concerned with the protection of certain Indian claims in existence at the time of statehood. See, *e. g.*, Hearings Before House Committee on Interior and Insular Affairs on H. R. 2535 and related bills, 84th Cong., 1st Sess. (1955) 124–131, 266–267, 381–383. But we cannot accept Alaska's contention that Indian "property (including fishing rights)" refers only to property owned by or held for Indians under provisions of federal law. Section 4 must be construed in light of the circumstances of its formulation and enactment. See *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 87. Congress was aware that few such rights existed in Alaska. Its concern was to preserve the status quo with respect to aboriginal and possessory Indian claims, so that statehood would neither extinguish them nor recognize them as compensable. See, *e. g.*, House Hearings, *supra* (1955), 130, 384 (Delegate Bartlett); Hearings Before Senate Committee on Interior and Insular Affairs on S. 50, 83d Cong., 2d Sess. (1954) 227, (Senator Jackson), 260–261.[1]

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[1] In 1948 a statehood bill requiring disclaimer of "all lands . . . owned or held by any . . . natives, the right or title to which shall have been acquired through or from the United States or any prior sovereignty," was favorably reported with this explanation:

"As proposed to be amended, this paragraph would preserve all existing valid native property rights in Alaska, including those derived from use or occupancy, together with all existing authority of the Congress to provide for the determination, perfection or relinquishment of native property rights in Alaska. It would neither add to nor subtract from such rights and such authority, but would simply maintain the status quo." H. R. Rep. No. 1731, 80th Cong. 2d Sess. (1948) 15.

To the same effect, see H. R. Rep. No. 255, 81st Cong. 1st Sess. (1949) 13.

Discussion during hearings on the 1955 House bill affords further evidence that claims not based on federal law are included. Section 205 of that bill (like § 6 of the bill as enacted) authorized Alaska to select large tracts of United States land for transfer to state ownership. It was understood that the disclaimer provision left the State free to choose Indian "property" if it desired, but that such a taking would leave unimpaired the Indians' right to sue the United States for any compensation that might later be established to be due. See House Hearings, *supra* (1955), 135 (Delegate Bartlett). Feeling that experience had shown this procedure too slow to give prompt relief to the Indians, Oklahoma's Representative Edmondson proposed to exempt Indian property from the State's selection. *Id.*, at 381. This was rejected as virtually destroying Alaska's right to select lands. For, although Representative Edmondson pointed out that the disclaimer extended only to property owned by Indians or held in trust for them, four representatives clearly stated their belief that the disclaimer included not just the few Alaska reservations but also the aboriginal or other unproved claims in dispute, which covered most if not all of Alaska. *Id.*, at 383 (Representatives Engle, Dawson, Metcalf, Westland).

"Fishing rights" first appeared in a Senate bill reported in 1951, S. Rep. No. 315, 82d Cong., 1st Sess. 2. Earlier bills had mentioned only land. The fishing rights provision is unique to Alaska, although the disclaimer is in other respects the same as in earlier statutes. See pp. 7–8, *infra*. It was included because fishing rights are of vital importance to Indians in Alaska. House Hearings, *supra* (1955), 125 (Delegate Bartlett). The existence of aboriginal fishing rights was affirmed by the Interior Department's Solicitor in 1942, 57 I. D. 461. There was almost no discussion of "fishing rights" in Congress. In earlier hearings the Senate Committee were considering a sug-

gestion by Senator Cordon that all Indian property be granted to the State, reserving the right to seek federal compensation, except for property actually occupied by Indians. Asked to describe Indian possessory rights, Governor Heintzleman portrayed a smokehouse beside a stream, 50 miles from the town where they live, visited for fishing purposes perhaps two weeks each year. Senate Hearings, *supra* (1954), 137.

On a similar basis the Kakes and the Angoons have fished at the disputed locations since 1948 and 1950. It appears to be Alaskan custom that, although traps are taken from the water and replaced each year, one does not "jump" a trap-site. The prior claim of the first trapper is respected. See *United States* v. *Libby, McNeil & Libby,* 107 F. Supp. 697, 700 (D. Alaska 1952); Gruening, The State of Alaska (1954), p. 171; 57 I. D. 461, 462 (1942). The Statehood Act by no means makes any claim of appellants to fishing rights compensable against the United States; neither does it extinguish such claims. The disclaimer was intended to preserve unimpaired the right of any Indian claimant to assert his claim, whether based on federal law, aboriginal right, or simply occupancy, against the Government. Appellants' claims are "property (including fishing rights)" within § 4.

Because § 4 of the Statehood Act provides that Indian "property (including fishing rights)" shall not only be disclaimed by the State as a proprietary matter but also "shall be and remain under the absolute jurisdiction and control of the United States," the parties have proceeded on the assumption that if Kake and Angoon are found to possess "fishing rights" within the meaning of this section the State cannot apply her law. Consequently argument has centered upon whether appellants have any such "rights."

The assumption is erroneous. Although the reference to fishing rights is unique, the retention of "absolute"

federal jurisdiction over Indian lands adopts the formula of nine prior statehood acts. Indian lands in Arizona remained "under the absolute jurisdiction and control" of the United States, 36 Stat. 557, 569; yet in *Williams* v. *Lee*, 358 U. S. 217, 220, 223, we declared that the test of whether a state law could be applied on Indian reservations there was whether the application of that law would interfere with reservation self-government. The identical language appears in Montana's admission act, 25 Stat. 676, 677, yet in *Draper* v. *United States*, 164 U. S. 240, the Court held that a non-Indian who was accused of murdering another non-Indian on a Montana reservation could be prosecuted only in the state courts. The Montana statute applies also to North Dakota, South Dakota, and Washington. Identical provisions are found in the acts admitting New Mexico (36 Stat. 557, 558–559) and Utah (28 Stat. 107, 108), and in the Constitutions of Idaho (1890, Art. 21, § 19) and Wyoming (1890, Art. 21, § 26), which were ratified by Congress (26 Stat. 215 (Idaho); 26 Stat. 222 (Wyoming)).

Draper and *Williams* indicate that "absolute" federal jurisdiction is not invariably exclusive jurisdiction. The momentum of substantially identical past admission legislation touching Indians carries the settled meaning governing the jurisdiction of States over Indian property to the Alaska Statehood Act in light of its legislative history.

Section 4 of the Statehood Act contains three provisions relating to Indian property. The State must disclaim right and title to such property; the United States retains "absolute jurisdiction and control" over it; the State may not tax it. On the urging of the Interior Department that Alaska be dealt with as had other States, these provisions replaced an earlier section granting to the State all lands not actually possessed and used by the United States. Hearings Before a Subcommittee

of the House Committee on Public Lands on H. R. 206 and H. R. 1808, 80th Cong., 1st Sess. (1947) 2, 12, 14. The first and third provisions have nothing to do with this case; the second does not exclude state conservation laws from appellants' fish-traps.

The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest. It was determined, after some debate, to be the best way of ensuring that statehood would neither extinguish nor establish claims by Indians against the United States. If lands subject to the claim of Indian rights were transferred to the State, the Indians were not thereby to lose the right to make claims against the United States for damages. See Senate Hearings, *supra* (1954), 286.

The provision for "absolute jurisdiction and control" received little attention in Congress. In the 1954 Senate hearings the Committee were considering a provision copied from the Oklahoma statute that Indian lands should remain "subject to the jurisdiction, disposal, and control of the United States." Mr. Barney, on behalf of the Justice Department, urged the inclusion of such a provision in order to avoid the possibility that, under *United States* v. *McBratney*, 104 U. S. 621, federal criminal jurisdiction over Indian reservations might be extinguished by statehood. Senators Barrett and Jackson thereupon expressed the clear desire that federal jurisdiction not be made exclusive over all disclaimed areas. Mr. Barney denied that the provision would deprive the State of "political jurisdiction" over disclaimed properties. Senator Cordon declared:

> "The State may well waive its claim to any right or title to the lands and still have all of its political or police power with respect to the actions of people on those lands, as long as that does not affect the title to the land."

Senator Jackson said: "All that you are doing here is a disclaimer of proprietary interest," and Mr. Barney agreed. Senator Cordon said:

> "The act of admission gives to the State of Alaska political jurisdiction, including all that is meant by the term 'police power,' within its boundaries unless there be express or definitely implied, which is the same thing, a reservation of exclusive jurisdiction in the United States."

Senators Barrett and Jackson and Mr. Barney agreed. Mr. Slaughter of the Interior Department pointed out that a later section of the bill, now § 10, provided for "exclusive" federal jurisdiction over Mt. McKinley National Park. Mr. Barney, in answer to a direct question, stated that "jurisdiction" in the Oklahoma statute and in his proposal for Indian property did not mean exclusive jurisdiction. Senate Hearings, *supra* (1954), 283–287. The bill as reported contained no provision on jurisdiction but only a disclaimer of right an title, a reservation of federal power to extinguish Indian claims as if there had been no statehood act, and an exemption from state taxation. *Id.*, at 331. Provisions retaining federal "jurisdiction" and "absolute jurisdiction" were considered interchangeable by at least one committee, which reported the disclaimer in an Alaska bill as "almost identical" with those in the preceding 13 admission acts. S. Rep. No. 315, 82d Cong., 1st Sess. (1951) 15.

Most statehood bills contained the more common phrasing "absolute jurisdiction and control" rather than the Oklahoma phrase. Although this was the usual language employed to retain federal power in statehood acts, the Senate Committee in 1958 out of an abundance of caution deleted the word "jurisdiction" in order that no one might construe the statute as abolishing state power

entirely. The Committee declared that it was not its intention by the retention of federal control to make the Alaska situation any different from that prevailing in other States as to state jurisdiction over Indian lands. S. Rep. No. 1163, 85th Cong., 1st Sess. (1957) 15. The House bill, which retained the usual langauge, was passed first, 104 Cong. Rec. 9756, and the Senate made no amendments to the House bill because it feared that statehood might be lost once again if the House had to act on a conference report. 104 Cong. Rec. 12009–12010. Senator Jackson stated that "the differences are of wording and language rather than policy . . . . designed to define more clearly some of the jurisdictional problems involved . . . . The objective of both bills is identical. There is strong evidence that the end product of both bills would be identical." The Senate amendment was designed simply to make clear what an examination of past statutes and decisions makes clear also: that the words "absolute jurisdiction and control" are not intended to oust the State completely from regulation of Indian "property (including fishing rights)." "Absolute" in § 4 carried the gloss of its predecessor statutes, meaning undiminished, not exclusive. Cf. *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 47–48. The power of Alaska over Indians, except as granted by Congress in 1958, 72 Stat. 545, is the same as that of many other States.

The relation between the Indians and the States has by no means remained constant since the days of John Marshall. In the early years, as the white man pressed against Indians in the eastern part of the continent, it was the policy of the United States to isolate the tribes on territories of their own beyond the Mississippi, where they were quite free to govern themselves. The 1828 treaty with the Cherokee Nation, 7 Stat. 311, guaranteed the

Indians their lands would never be subjected to the jurisdiction of any State or Territory. Even the federal Government itself asserted its power over these reservations only to punish crimes committed by or against non-Indians. 1 Stat. 469, 470; 2 Stat. 139. See 18 U. S. C. § 1152.

As the United States spread westward, it became evident that there was no place where the Indians could be forever isolated. In recognition of this fact the United States began to consider the Indians less as foreign nations and more as a part of our country. In 1871 the power to make treaties with Indian tribes was abolished, 16 Stat. 544, 566, 25 U. S. C. § 71. In 1887 Congress passed the General Allotment Act, 24 Stat. 388, as amended, 25 U. S. C. § 331–358, authorizing the division of reservation land among individual Indians with a view toward their eventual assimilation into our society. In 1885, departing from the decision in *Ex parte Crow Dog*, 109 U. S. 556, Congress intruded upon reservation self-government to extend federal criminal law over several specified crimes committed by one Indian against another on Indian land, 23 Stat. 362, 385, as amended, 18 U. S. C. § 1153; *United States* v. *Kagama*, 118 U. S. 375. Other offenses remained matters for the tribe, *United States* v. *Quiver*, 241 U. S. 602.

The general notion drawn from Chief Justice Marshall's opinion in *Worcester* v. *Georgia*, 6 Pet. 515, 561; *The Kansas Indians*, 5 Wall. 737, 755–757; and *The New York Indians*, 5 Wall. 761, that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdic-

tion except as forbidden by federal law, *Utah & Northern R. Co.* v. *Fisher*, 116 U. S. 28, 31. In *Langford* v. *Monteith*, 102 U. S. 145, the Court held that process might be served within a reservation for a suit in territorial court between two non-Indians. In *United States* v. *McBratney*, 104 U. S. 621, and *Draper* v. *United States*, 164 U. S. 240, the Court held that murder of one non-Indian by another on a reservation was a matter for state law.[2]

The policy of assimilation was reversed abruptly in 1934. A great many allottees of reservation lands had sold them and disposed of the proceeds. Further allotments were prohibited in order to safeguard remaining Indian properties. The Secretary of the Interior was authorized to create new reservations and to add lands to existing ones. Tribes were permitted to become chartered federal corporations with powers to manage their affairs, and to organize and adopt constitutions for their own self-government. 48 Stat. 984, 986, 987, 988. These provisions were soon extended to Alaska, 49 Stat. 1250.

Concurrently the influence of state law increased rather than decreased. As the result of a report making unfavorable comparisons between Indian Service activities and those of the States, Congress in 1929 authorized the States to enforce sanitation and quarantine laws on Indian reservations, to make inspections for health and educational purposes, and to enforce compulsory school attendance. 45 Stat. 1185, as amended, 25 U. S. C. § 231. See Meriam, Problem of Indian Administration (1928); H. R. Rep. No. 2135, 70th Cong., 2d Sess. (1929); Cohen, Handbook of Federal Indian Law (1941), p. 83; United States Depart-

[2] *Fisher* permitted a territorial tax on a railway through Indian country, and one basis for the holding was that here discussed. The alternative ground was that the railway right-of-way had been withdrawn from the reservation, as was held in *Maricopa & Phoenix R. Co.* v. *Arizona Territory*, 156 U. S. 347.

ment of the Interior, Federal Indian Law (1958), pp. 126–127. In 1934 Congress authorized the Secretary of the Interior to enter into contracts with States for the extension of educational, medical, agricultural, and welfare assistance to reservations, 48 Stat. 596, 25 U. S. C. § 452. During the 1940's several States were permitted to assert criminal jurisdiction, and sometimes civil jurisdiction as well, over certain Indian reservations. *E. g.*, 62 Stat. 1161; 62 Stat. 1224; 64 Stat. 845; 63 Stat. 705. A new shift in policy toward termination of federal responsibility and assimilation of reservation Indians resulted in the abolition of several reservations during the 1950's. *E. g.*, 68 Stat. 250 (Menominees); 68 Stat. 718 (Klamaths).

In 1953 Congress granted to several States full civil and criminal jurisdiction over Indian reservations, consenting to the assumption of such jurisdiction by any additional States making adequate provision for this in the future. 67 Stat. 588, 18 U. S. C. § 1360, 25 U. S. C. § 1162. Alaska was added to the list of such States in 1958, 72 Stat. 545. This statute disclaims the intention to permit States to interfere with federally granted fishing privileges or uses of property. Finally, the sale of liquor on reservations has been permitted subject to state law, on consent of the tribe itself. 67 Stat. 586, 18 U. S. C. § 1161. Thus Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall.

Decisions of this Court are few as to the power of the States when not granted Congressional authority to regulate matters affecting Indians. In *Thomas* v. *Gay*, 169 U. S. 264, an Oklahoma territorial tax on the cattle of non-Indian lessees of reservation land was upheld on the authority of the *Fisher* and *Maricopa* decisions, *supra*, which permitted taxation of railroad rights of way. The Court conceded that because the lands on which the taxed

cattle grazed were leased from Indians the tax might, in contrast to the railroad cases, have an indirect effect on Indians, but that effect was declared to be too remote to require a contrary result. In the latest decision, *Williams* v. *Lee*, 358 U. S. 217, we held that Arizona had no jurisdiction over a civil action brought by a non-Indian against an Indian for the price of goods sold the latter on the Navajo Reservation. The applicability of state law, we there said, depends upon "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them," 358 U. S., at 220. Another recent statement of the governing principle was made in a decision reaffirming the authority of a State to punish crimes committed by non-Indians against non-Indians on reservations: "In the absence of a limiting treaty obligation or Congressional enactment each State had a right to exercise jurisdiction over Indian reservations within its boundaries," *New York ex rel. Ray* v. *Martin*, 326 U. S. 496, 499.

These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. Congress has gone even further with respect to Alaska reservations, 72 Stat. 545, 18 U. S. C. § 1162, 28 U. S. C. § 1360. State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation. It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country. See Cohen, Indian Rights and the Federal Courts, 24 Minn. L. Rev. 145, 153 (1940), citing *Pablo* v. *People*, 23 Colo. 134, 46 P. 636. Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward* v. *Race Horse*, 163 U. S. 504; *Tulee* v. *Washington*,

315 U. S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* to fishing within a reservation, *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 P. 557; *Moore* v. *United States*, 157 F. 2d 760, 765 (C. A. 9th Cir.). See *State* v. *Cooney*, 77 Minn. 518, 80 N. W. 696.

True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams* v. *Lee*. Nor have appellants any fishing rights derived from federal laws. This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy. Because of the migratory habits of salmon, fish-traps at Kake and Angoon are no merely local matter.

Congress has neither authorized the use of fish-traps at Kake and Angoon nor empowered the Secretary of the Interior to do so. The judgment of the Supreme Court of Alaska is affirmed. However, in view of all the circumstances and in order to avoid hardship, the stay granted by MR. JUSTICE BRENNAN, and continued by the Court, will remain in force until the end of the 1962 salmon fishing season, as defined in the regulations issued by the Secretary of the Interior.

It is so ordered.

MR. JUSTICE DOUGLAS, while joining the opinion of the Court, dissents from an extension of the stay for reasons to be stated in an opinion.

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1961.

Organized Village of Kake, and Angoon Community Association, Appellants, *v.* William A. Egan, Governor of Alaska.	On Appeal From the Supreme Court of the State of Alaska.

[March 19, 1962.]

Mr. Justice Douglas.

When the decision in this case was announced on March 5, 1962, I noted that while I joined the opinion of the Court, I dissented from the continuation of the stay and would elaborate my views at a later time. As the decision to extend the stay was reached in Conference on March 2, 1962, there was insufficient time to prepare an opinion by the following Monday.

The stay was first granted by Mr. Justice Brennan, 80 Sup. Ct. 33, to maintain the *status quo* while this litigation was pending. The stay was then plainly justified, as the questions presented were substantial ones. Now, however, the adjudication has been made; and the Court is unanimous in concluding that these Indians have no right to use fish traps. A stay is not needed to protect rights that may arise from future Regulations as in the *Metlakatla* case, for any administrative power of the Secretary of the Interior to allow the Kake and Angoon Indians to use traps is lacking. And with all deference, a stay is not shown to be justified on any other grounds.

A stay that continues in use for another season a device as nefarious as the fish trap needs potent reasons.

The destruction caused by fish traps is notorious. Mr. Justice Van Devanter, conservationist as well as jurist, described an Alaskan fish trap [1] designed "to catch about 600,000 salmon in a single season," a trap which "will tend materially to reduce the natural supply of fish accessible to the Indians." *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 87. Dr. David Starr Jordan in his 1904 report of the Alaska Salmon Commission stated, "If we consider the ultimate interests of Alaska and the permanence of her salmon fisheries, no traps should be allowed anywhere. . . ." Gruening, The State of Alaska (1954), p. 169. Beginning in 1931 the Territorial Legislature memorialized Congress condemning the use of the fish trap because of its adverse effect on salmon and on the salmon industry. See Alaska, Sess. Laws, 1931, p. 275; Alaska, Sess, Laws, 1953, pp. 401–402; Alaska, Sess. Laws, 1955, pp. 447–448. The 1955 Resolution ended by saying:

> "WHEREAS, the vast majority of Alaskans, after many decades of first hand experience and study, are con-

[1] The salmon trap is described by the Alaska Supreme Court as follows:

"A trap consists of tall stakes or mechanically driven piling extending from the shore to varying distances seaward, depending on the depth of the water. Wire or webbing is stretched across the stakes or piling from the shore to the seaward end and from the ocean bottom upward to a point above high water. Located at the seaward end is an extended wing or hook and an opening into the heart and pot. When the webbing is on the ocean bottom fish cannot pass around the trap at the shoreward end. One tendency of migrating fish is to parallel the shoreline and travel with the incoming tide. Fish stopped by the webbing of a trap will eventually follow it seaward in an attempt to by-pass the obstruction. The wing or hook is constructed so as to discourage by-passing and divert the fish into the heart and pot where they remain. With some variations in construction, floating traps adapted to deep water are commonly used and are highly productive." *Metlakatla Indian Community* v. *Egan,* — Alaska —; 362 P. 2d 901, 903.

vinced that no salmon conservation program can achieve lasting effect unless salmon fish traps are abolished immediately, forever, from Alaskan waters;

. . . . .

"Now THEREFORE, your Memorialist, the Legislature of the Territory of Alaska, respectfully urges and requests that immediate legislation be enacted abolishing fish traps from the waters of the Territory of Alaska."

In 1959, the Alaskan Native Brotherhood, organized to speak for the Indians [2] reiterated its stand "for complete abolition of traps."

Senator Gruening, on March 6, 1962, issued a statement to the Associated Press which emphasized another invidious effect of the use of fish traps by the Indians:

"The 1945 Alaska Territorial Legislature, at my behest, while I was Governor, passed on Act outlawing discrimination in public establishments based on race, creed, or color. This was designed to safeguard Alaska's Native people who had been subject to such discrimination and it did so safeguard them. Secretary Seaton's action would have created an inverse discrimination against Whites deeply sowing see'ds of bitterness and arousing interracial friction and antagonism which has no place in America and had disappeared in Alaska. The performance was an inexcusable pressure play. In a referendum on fish traps in 1948, 88.7% of the people of Alaska voted for trap abolition, and Angoon's vote was 49 to 9 and Kake's 123 to 6 against traps. Yet Secretary Seaton sought to force traps upon them and on the people of Alaska.

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[2] See Federal Indian Law (Dept. of Interior, 1958), p. 963.

"The Court's decision in the Metlakatla case differs in its conclusion from the Kake and Angoon cases only because of Metlakatla's historically different and unique legal status. It leaves the course of action open to the present Secretary of Interior. It is to be hoped that both he and the people of Metlakatla, who in the 1948 referendum—though owning seven traps—voted 112 to 33 for trap abolition, will agree that privilege and discrimination based on race and should finally disappear totally from the 49th State."

The devastating effect of fish traps upon Alaska's economy was described by the Alaska Supreme Court:

"It has not been unusual for a single trap to catch as many as 600,000 fish in a single season. The impact of the catch of eleven traps on the fisheries of southeastern Alaska is considerable from the point of view of conservation. The season's catch of a gill net or purse seine fisherman in the same area might run from 2,000 to 10,000 fish respectively. The discrimination against all fishermen, natives and whites alike, resulting from the Secretary's 1959 regulation, creates social problems for the state which it is powerless to remedy if the Secretary's claimed right is upheld. The intention to retain such a power over the basic industry of the state was not intimated in the wording of the Alaska Statehood Act, much less described. Such a power has never been reserved as to any other state admitted into the Union as far as this court is aware. The fisheries of Alaska, although pitifully depleted, are still its basic industry. The economy of the entire state is affected, in one degree or another, by the plentitude of the salmon in a given season. The preservation of this natural resources

is vital to the state and of great importance to the nation as a whole." *Metlakatla Indian Community* v. *Egan*, — Alaska —; 362 P. 2d 901, 915.

The fish trap is "efficient," [3] an adjective which, by conservation standards, means that it is "destructive." As Senator Gruening has said, "Its economic and social aspects have been under unceasing attack by virtually all fishermen, by cannery men who do not own or control traps and have to depend on other types of gear for their salmon, and by the Alaska public generally." Gruening, The State of Alaska (1954), pp. 170–171.

Moreover, the fish trap is not a selective device, taking only one type of fish. It catches everything that swims; and fish that are not "in season" are as irretrievably lost as are those in which the fishermen have the greatest interest.

We should not allow such a destructive device [4] to be employed, absent a claim of legal right or a showing of imperative need. As I have said, no such right exists

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[3] Those who defend the fish trap rate it as being a degree better than the purse seine. This is because the purse seine is movable and "difficult to keep track of by the inspectors," while the fish trap is stationary and can be readily inspected. See Hearings before Subcommittee, Senate Committee on Fisheries on S. 5856, 62d Cong., 2d Sess., pp. 458–459.

[4] Those who defend the fish trap are quick to add "provided the trap has no jigger." Hearings, *supra*, note 3, at 458. Senator Gruening describes the "jigger":

"The 'jigger' is a lateral extension of the trap, curved or hooked, extending away from the wall of the outer 'heart' into the direction from which the salmon come. It makes avoidance of the trap toward which at that point the salmon are heading almost impossible." Gruening, The State of Alaska (1954), p. 170.

It is significant that the Regulations under which these Indians are now allowed to fish during the 1962 season do not bar the "jigger" (see 25 CFR § 88.3), though the Territorial Legislature as early as 1913 had banned it. See Gruening, *op. cit.*, *supra*, at 169.

subsequent to our unanimous decision of March 5, 1962. It is, of course, provided in 28 U. S. C. § 2106 that in disposing of cases here for review we may not only "affirm, modify, vacate, set aside or reverse," but also "require such further proceedings to be had as may be just under the circumstances." But we have no reason for concluding that it would be unjust to turn these Indians to fishing with gill nets or hand lines like everyone else. All we have before us is a motion made in October 1961 to expedite a hearing in these cases. In that motion it is said:

> "The 1962 fishing season in Alaska begins in July, 1962. To prepare for this fishing season, Appellants must commit large sums of money for materials and supplies, including wire, netting, and cannery equipment. A large portion of these materials must be ordered not later than January, 1962. If Appellants' right to fish with traps were not to be upheld, their investment would be wasted. Conversely, if Appellants' right to fish with traps is upheld, Appellants will be unable to fish unless substantial sums of money are committed early in 1962."

Whether any sums have in fact been committed to the construction of these nefarious fish traps we do not know. Why these Indians cannot fish in the manner of all other fishermen is not apparent. Since the fishing season starts in July, they have four months from the date of our decision to prepare for it. What problems, if any, they may have in fishing without traps, we do not know. They have asked for no stay at this juncture of the litigation. We act gratuitously and without any knowledge of the actual facts. We in effect dispense to this group who have no legal rights a *largesse*, as if we sat as a Commission on Indian Affairs, giving a part of the public domain to this favored few.

Those who know the story of the decline of the salmon [5] can only look with concern on any action that further depletes the supply of this choice national asset. Severe human hardship may result from the decision we handed down on March 5, 1962. But if that is true, we should

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[5] James Wickersham, delegate in Congress from Alaska, testified in 1914 as to the start of the depletion of the salmon:

"I want to call the attention of the committee to one stream which has been depleted in California, and that is the Sacramento River. The Sacramento River was one of the first rivers upon which canners put up salmon. In 1864 the first canned salmon were packed in California on the Sacramento River. In 1882 there were 200,000 cases of canned salmon put out from the Sacramento River—48 pounds to the case, making a total of 4,800 tons of salmon canned during that year on the Sacramento River.

"Then it began to decrease, and it went down to 123,000; then to 90,000; then to 57,000; then to 31,000; then to 14,000; and finally in 1906 there were none put up on that river. For three or four years there were none put up, but in 1913 there were 950 cases put up on the Sacramento River. In short, that great salmon stream has been utterly destroyed and there are no fish there now, substantially.

"Of course, that situation resulted from several causes. It resulted from overfishing, and from putting barriers across the streams to catch the fish, and it resulted in part from mining. All these things are going to happen in Alaska. There is mining going on there now on many of these streams. All the obstacles that operated to bring about that evil in the Sacramento River will operate in Alaska as soon as they open up that country. As soon as that is done and they get to work in there, the streams there are going to be depleted.

"When the first Russians went to Kadiak Island, more than a century ago, they found the Karluk salmon stream surrounded by Indians. It was a great fishing spot. That stream has probably turned out more canned salmon than any other stream in Alaska. Dr. Evermann and all those who were acquainted with it say it was the greatest salmon stream in the world. I saw the fishing going on there in 1903. I know how it was done. They had at one side a great post set in the ground sufficient to hold the nets. The nets were put into big boats, and they were long nets, some of them half a mile long, I suppose, and they were carried out into the bay, and as they came around they were fastened to a rope on the shore, to

require that it be shown. The disposition of these cases four months before the 1962 fishing season starts gives ample notice that new ways of earning a livelihood must be found other than the lazy man's device of the fish trap.[6]

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which was attached a big engine, and when they got that far along the big engine pulled the nets for them. The number of fish which they caught in there is simply unbelievable, and they were pulled in by machinery. The men themselves were unable to handle big nets of that kind. They were able to handle the small nets, but when they got machinery handling the fish for them they soon destroyed that stream. Every fisherman in that region knows it is destroyed; knows that the greatest salmon stream in Alaska has been destroyed." Hearings, House Committee on the Territories on H. R. 11740, 63d Cong., 2d Sess., pp. 45–46. For later discussions on the plight of the salmon of the Pacific, see Hearings, Merchant Marine and Fisheries Subcommittee, Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., on S. Con. Res. 35, pt. I, and on S. 502; Hearings, Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., on S. Con. Res. 35, S. 2586 and S. 1420, pt. II.

The depletion of salmon from California to Alaska is notorious. See Dufresne, Troubled River, Field and Stream, July 1959, p. 27; Netboy, Salmon of the Pacific Northwest (1958); 1958, A Year of Surprise in Pacific Salmon Canning, Pacific Fisherman, Jan. 25, 1959, p. 81; *id.*, Jan. 25, 1960, p. 53; *id.*, Jan. 25, 1961, pp. 13, 23; Van Fleet, The Vanishing Salmon, Atlantic, May 1961, pp. 48, 51.

"In my estimation, the former great wealth of the salmon fishery in California is doomed. In Oregon, the main runs are badly crippled but not entirely gone. In Washington, the runs are diminished along the coast and in the waters around Puget Sound, but careful husbandry could even bring about an increase. My advice to Alaska is to heed the lesson so well portrayed in the states to the south of it."

The Hearings, *supra*, on S. 502 are replete with examples of the impact on people and on the Alaska economy of the salmon depletion. This depletion also has a serious impact on wildlife. For an account of what a scarcity of salmon means to the brown bear population, see the Hearings, *supra*, on S. 502, at 25–26.

[6] "A trap fishes in the night when the man sleeps; it employs less men than the other kinds of gear; it is a labor-saving device. . . ." Hearings on S. 5856, *supra*, note 3, at 389.